IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.No.1201 of 2018
and
C.M.P.Nos.9841 & 21435 of 2018

M/s.VijayalakshmiPalanisamy Charitable Trust
KalaignarKarunanidhi College of Engineering
Kannampalayam
Coimbatore
Rep.by its Managing Trustee ..Appellant

Vs.

The Sub-Regional Director,
Employees State Insurance Corporation
No.1897, Trichy Road,
Ramanathapuram,
Coimbatore - 641 045 ..Respondent

Prayer : Civil Miscellaneous Appeal filed under Section 82 of the Employee's State Insurance Act 1948, against the order dated 20.09.2017, passed by the Presiding Officer, Employees State Insurance Court Cum Labour Court, Coimbatore in E.I.O.P.No.5 of 2011.

For Appellant : Mr.R.Jayaprakash

For Respondents : Mr.S.P.Srinivasan
ESI Counsel

J U D G M E N T

The order dated 20.09.2017 passed in E.I.O.P.No.5 of 2011 is under challenge in the present Civil Miscellaneous Appeal.

2. The Substantial Question of law raised by the appellant, which reads as under:

"(a) Whether in the teeth of the admitted factual position that the property purchased in a public auction conducted under SARFAESI Act could be termed as transfers that factory or establishment in whole or in part, by sale, gift, lease or license or in any other manner whatsoever so as to attract Section 93A of the ESI Act?

(b) Whether the Impugned Order suffers from an error of Jurisdiction, particularly in view of the Section 93A of the ESI Act?

(c) Whether the claim of the Respondent is barred by limitation by virtue of proviso to Section 45-A of the ESI Act.

(d) Whether the claim of the Respondent is maintainable against the Appellant in the absence of an order determining contributions under Section 45A of the ESI Act after giving reasonable opportunity of being heard.

e) Under the facts and circumstances of the case, can this Appellant be held liable for payment of compensation?"

3. The learned counsel appearing on behalf of the appellant confined with the substantial question of law by stating that under Section 93-A of the ESI Act, auction purchase of factory under the SARFAESI Act from the Bank cannot be covered. The auction purchase of a property from a Bank under the SARFAESI Act is not covered under Section 93A of the ESI Act and therefore, the Recovery imposed by the respondent/ Corporation is directly in violation of the provisions of the Act and thus, the orders passed by the ESI Court is liable to be scrapped.

4. In reliance, the learned counsel for the appellant cited the judgment in the case of Sri Angappa Spinning Mills and Ors., Vs Regional Commissioner, Employees Provident Fund Tamilnadu and Pondicherry, in W.P.No.3760 and 4151/1979, dated 29.10.1985, wherein the scope of Section 17B of the Employees Provident Fund and Miscellaneous Petition Act was considered by this Court and he referred the following observations made by this Court in Paragraph 6 and the same is extracted hereunder:

"6............The liability to pay contribution and other sums on transfer of an establishment is specially provided for under section 17-B of the Act. The need for making special provision fastening liability for the payment of contribution and other sums on the transferee is a clear pointer that otherwise no person other than the employer would be liable for its payment. To put it differently, the underlying principle behind section 17-B of the Act is that the employer, who is liable under section 6 of the Act to pay the contribution and other sums, cannot by merely resorting to the device of transfer, be permitted to avoid such liability and, therefore it is, provision is made under section 17-B of the Act that the employer as well as his transferee shall be jointly and severally liable to pay the contribution and other sums up to the date of transfer. The specification of the period also indicates that primarily the liability would be that of the transferring employer, and by reason of the transfer, the liability on the employer would not cease, but would continue to exist and would also be fastened upon the transferee, though limited to the value of the assets obtained by the transferee by such transfer. Section 17-B of the Act, by making a special provision for the joint liability of the transferor and the transferee with reference to contributions and other sums due from the employer up to the date of such transfer, also clearly brings out that but for section 17-B of the Act, the transferor-employer alone would be liable. In other words, the employer cannot be permitted to defeat his obligation to pay the contributions and other sums by transferring the establishment and, therefore it is, that up to the date of the transfer, the transferor and the transferee are both made liable jointly and severally. But at the same time, the transfer contemplated under section 17-B of the Act is a transfer by an employer. The use of the words "where an employer ..... transfers clearly indicates that the act of transfer must be attributed or referable to the employer if section 17-B of the Act, fastening the liability on the employer and the transferee for the payment of contribution and other sums, is to operate. The transfer by the employer of the establishment contemplated under section 17-B of the Act is by an act of transfer by the employer; as otherwise, the word used would not have been 'transfers' as found. If transfers other than a transfer by the employer had been contemplated, the language employed would have been different, for instance, if a transfer not attributable to an employer had also been contemplated, then the words "where the establishment had been transferred" could have been used. There is thus no indication that section 17-B of the Act contemplated transfers otherwise than by an employer as defined in the Act in relation to an establishment. A court sale takes place by operation of law and not by any transaction inter vivos. In that sense, it is an involuntary sale against the wishes of the person whose property is sold. That can hardly be called a transfer, as ordinarily understood, which connotes a voluntary transaction entered into between two parties. In this connection, it has also to be remembered that the provisions of the Transfer of Property, Act generally dealing with all kinds of transfers do not affect transfers by operation of law or by, or in execution, of, a decree or order of a Court of competent jurisdiction under section 2(d) of the Transfer of Property Act. It is also settled that a purchaser at a court sale is a transferee by operation of law. A court auction sale cannot, therefore, be considered as a transfer by an employer of the establishment to the transferee."

5. Further, he referred the judgment of the Nagpur Bench of Bombay High Court in the case of Ank Seals Vs. Employees, State Insurance Corporation and Ors, in W.P.No.536 of 1996 dated 21.02.2006, wherein the following observations are made in Paragraphs 8 and 15 of the judgment and the same is extracted hereunder:

"8....................He submitted that the provisions of Section 17-B of the Employees Provident Fund Act are pari materia to that of the ESI Act and this was a case where the petitioner had purchased the property from the State Financial Corporation and the High Court on examining the case came to the conclusion that such transfer would not come within the mischief of Section 17-B and held as under in para 6 of the reported judgment:

A conjoint reading of the provisions of Sections 2, 8 and 17B of the EPF Act as quoted above gives a clear picture that the liability to pay contribution and other sums due from the employer on transfer of an establishment is specifically provided in Section 17B of the EPF Act. The principle behind it is that the employer, who is liable to pay Under Section 6 of the Act the contribution and other sums, cannot by reason of its owning or occupying the establishment on transfer be permitted to avoid such liability and, therefore, provision is made Under Section 17B of the Act, that the employer as well as the transferee shall be jointly and severally liable to pay the contribution and other sums up to the date of transfer. This speaks that by reason of the transfer, the liability on the employer would not cease, but would continue to exist and would also be fastened upon the transferee, though limited to the value of the assets obtained by the transferee by such transfer. The transfer by the employer of the establishment contemplated Under Section 17B is an act by the employer. Here is a case where the transfer has not been made by the employer but after seizure of the unit/establishment, the same was transferred by the OSFC to the present petitioner. There is no indication that Section 17B contemplates transfers otherwise than by an employer as defined in the EPF Act in relation to an establishment. By a Court sale or otherwise a transfer takes place by operation of law and not by any transaction inter vivos. In that sense, it is an involuntary sale against the wishes of the person whose property is sold. That can hardly be called a transfer, as ordinarily understood, which connotes a voluntary transaction entered into between two parties. In this connection it has also to be remembered that the provisions of the Transfer of Property Act generally dealing kinds of transfers do not affect transfer by operation of law, or by or in execution of a decree or order of a Court of competent jurisdiction Under Section 2 (d) of the Transfer of Property Act.

It is submitted that this is an identical case where the petitioner has not purchased the property from the defaulter of respondent Nos. 1 and 2 but it has purchased the property in auction sale conducted by respondent Nos. 3 and 4 in recovery of their dues from respondent Nos. 1 and 2 and, therefore, it cannot be said to be a transfer made by respondent Nos. 1 and 2 in favour of the petitioner.

15. Plain reading of Section 93-A also makes it clear that the word 'transfer' in Section 93-A has a different connotation than "transfer" under the Transfer of Property Act; it means creation of rights whether by sale or gift or any other manner whatsoever; the Section seeks to avoid the employer's mischief by executing agreements of transfer in favour of a third party and yet retaining his dominance over the factory. It is this principle which was highlighted by the decision of this Court between Vemly Hotels and Kuldeep Singh and Ors.. Such is not the case insofar as the petitioners are concerned and as rightly submitted by Mr. Padiyar, the petitioner cannot be fastened with the liability to pay dues as in the first place he has not accepted the liability to pay the dues of respondent Nos. 1 and 2 and secondly, he has purchased the property not by virtue of transfer effected by employer but by intervening secured creditor, i.e. respondent Nos. 3 and 4 and, therefore, in the facts of the case, the decision of the Bombay High Court in Vemly Hotels' case does not in any manner assist the respondent Nos. 1 and 2. On the other hand, the cases of Suburban Ply and Panels (P) Ltd. v. Regional Provident Fund Commissioner and Ors. 2004 Lab.I.C. 1190 and M/s Swadeshi Cotton Mills, Mau Nath Bhanjan v. The Regional Director, Employees State Insurance Corporation, Kanpur reported in 1994(69) FLR 949 : 1995 (I) LLJ 703 (cited supra) squarely apply to the case of the petitioner."

6. Relying on the said judgments, the learned counsel for the appellant reiterated that the auction purchase from a Bank under the SARFAESI Act cannot be construed as a sale within the meaning of Section 93A of the ESI Act and therefore, the Recovery imposed is liable to be set aside.

7. The learned counsel appearing on behalf of the respondent solicited the attention of this Court with reference to the auction notice issued by the Recovery officer, which reveals that the property is available for sale by way of an auction. Certificate of sale was also issued by the Recovery officer, Debt Recovery Tribunal. Thus, the auction sale is a sale within the meaning of the Act and therefore, the recovery imposed is proper and in accordance with the provisions of Section 93A of the Act. In this regard, the learned counsel for the respondent relied the judgment of the Hon'ble Supreme Court of India in the case of AI Champdany Industries Limited Vs. The Official Liquidator and another, reported in 2009 (3) CTC 881 and the relevant paragraph 21 is extracted hereunder:

> 21. Clause (g) of sub-section (1) of Section 55 of the Transfer of Property Act whereupon reliance has been placed by Mr Sen reads as under:
>
> "55. Rights and liabilities of buyer and seller.—In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:
>
> (1) The seller is bound—
>
> ***
>
> (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest to all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing."
>
> In terms of the aforementioned provisions, therefore, the seller is bound to pay all the public charges due in respect of the property up to the date of sale, when a property is sold in auction.

8. It is relevant to consider the spirit of Section 93A of the ESI Act.

9. Section 93A was inserted by Act 38 of 1975 with effect from 01.09.1975 and the provision reads as under:

> "93A. Liability in case of transfer of establishment.?Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the factory or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods up to the date of such transfer: Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer."

10. Reading carefully the said provision enumerates that " Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever....". Thus, it is unambiguous that sale, gift or lease or in any other manner, if the establishment is transferred in whole or in part, then the authorities competent under the ESI Act are empowered to issue recovery order.

11. In the present case, it is the auction purchase and nothing but sale of immovable properties by the Recovery officer of the Debt Recovery Tribunal under the SURFAESI Act. Therefore, the said transfer of immovable property is undoubtedly a sale, and the sale, if made in any other manner is also to be construed as a sale within the meaning of Section 93A of the Act. Thus, gift or sale or lease or license if made in any form, must be construed as a sale for the purpose of Section 93A of the Act and therefore, the very contention raised by the appellant that the auction purchase by he Recovery officer of Debt Recovery Tribunal cannot be a sale is incorrect and cannot be accepted at all. Section 93A is unambiguous and crystal clear regarding the sale of an immovable property in any manner. Thus, even otherwise also, auction purchase is a sale and thus, the question of law raised in this regard by the appellant stands rejected. The auction purchase from the Recovery officer of Debt Debt Recovery Tribunal is also a sale within the meaning of Section 93A of the ESI Act and thus, the appeal deserves no merit consideration.

12. Accordingly, the order dated 20.09.2017 passed in E.I.O.P.No.5 of 2011 stands confirmed and the Civil

Miscellaneous Appeal in C.M.A.No.1201 of 2018 stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

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To

The Presiding Officer,
Employees State Insurance Court Cum Labour Court,
Coimbatore.

+1cc to Mr.R.Jayaprakash, Advocate SR.No.15000

+1cc to Mr.S.P.Srinivasan, Advocate SR.No.15106

C.M.A.No.1201 of 2018
and
C.M.P.Nos.9841 & 21435 of 2018

MGR(CO)
GMY(15/04/2021)